REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA

AT NAIROBI (NAIROBI LAW COURTS)

Criminal Case 102 of 2005

REPUBLIC…….…….…….PROSECUTOR

VERSUS

NOAH ITOTE MUTHOKA ……..……....…….. ACCUSED

RULING

The accused in this case Noah Itote Muthoka, is charged with murder contrary to section 203 as read with section 204 of the Penal Code.

It is alleged that on 31st day of August, 2005 at Kayole Estate, within the Nairobi Area, murdered SAMWEL MAINA GITHUI.

This case for the prosecution was heard in full by Hon. Ojwang J. He took the evidence of PW1 through to PW5, the only witnesses for the prosecution. The learned Judge also ruled in the case under s 306 of the Criminal Procedure Code and declared that the accused was to answer the charge as the prosecution had established a prima facie case against him.

When my learned brother was transferred out of the station the matter came to me to hear and finalize it. I explained to the accused his rights under s 200 of the Criminal Procedure Code. The accused elected to have the case proceed from where it left off, as advised by his advocate. Having so elected, I had to proceed and take his defence which I did.

I have now read the entire proceedings in this case. I wish to record what I noted, that there is a procedural defect in that on 13th November 2007, Hon. Ojwang J. discharged the three Assessors who had been participating in the trial for the reason that in light of Statute Law (Miscellaneous Amendments) Act No. 7 of 2007 the assessors were no longer required in the case.

The learned Judge thereafter heard the evidence of PW5, who was a formal witness that is scenes of crime officer. The judge subsequently made a ruling in the case effectively placing the accused to his defence. I have already stated how I took over the case.

I am aware of the Court of Appeal rulings in cases of this nature. In the case of PETERSON MAINA WANJIKU, VS REPUBLIC, C.A. NO. 49 of 2008, the Court of Appeal declared a trial defective where the trial judge had discharged assessors who had participated at the trial before the case was concluded. The Court of Appeal put it in the following manner:

"As at the stage when the learned Judge was discharging the assessor, the trial of the appellant was at an advanced stage with ten witnesses having testified on behalf of the prosecution. After the discharge of the assessors, the prosecution recalled one witness (P.W.9) and then the last witness (P.W.11). The prosecution thereafter closed its case. In view of the provisions of *section 23 (3)* of the *Interpretation and General Provisions Act* which we have set out at the beginning of this judgment, we think the learned Jude was not justified in summarily discharging the assessors. The appellant was entitled to be tried with the aid of assessors and the deletion of *section 262* of the *Criminal Procedure Code by Act No. 7 of 2007* did not and could not have deprived the appellant of the right which had accrued to him when the new legislation came into force. That was the view taken by this Court in the case of BENARD KINOTI M'ARACHI vs. REPUBLIC, Criminal Appeal No. 114 of 2008 (unreported) where Sitati, J. had applied the same reasoning as that of Makhandia, J. On both occasions, none of the learned Judges referred to the provisions of the *Interpretation and General provisions Act*. In BENARD's case, the Court ordered a retrial.

We think the Court must take the same position in the present appeal. In the appeal before us, there was evidence upon which a reasonable tribunal properly directing itself could well found a conviction. In the circumstances, we allow this appeal, set aside the conviction and consequent sentence of death and order that the appellant shall be tried afresh before another judge other than Makhandia, J. As this will be entirely a new trial, the appellant shall not be entitled to be tried with the aid of assessors, the new trial coming as it does, long after the abolition of trials with the aid of assessors. Pending the new trial, the appellant shall remain in prison custody. Those shall be the orders of the Court in this appeal."

In light of the above judgment I find that it is unwise to perpetrate a nullity by concluding a defective trial. That does not assist the accused or help in the case. Much as reaching this decision has caused me great anxiety, considering the time the accused has been in custody, I still find it will be more efficacious if I declared this trial a mistrial.

Accordingly, I declare the proceedings in this case a mistrial. The accuse case will have to start afresh, this time without the services of assessors. Consequently I direct that the case be heard expeditiously. Those are my orders. The accused has a Right of Appeal against this ruling.

Dated at Nairobi this 9th day of December, 2009.

LESIIT

JUDGE

Read, signed and delivered in the presence of

Elisha Court clerk

Accused Present

Mr. Imbali for the State

Mr. Mulei for the Accused

LESIIT

JUDGE